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Supreme Court, U.S.
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No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME VI

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(dated September 29, 1989). 341

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff, Crim. No.

v 84-20715

CHARLES F. COLLINS,
FRANCIS RICHARD FITZSIMMONS,
SOL C. SCHWARTZ, and
ROGER TOWNE,

Hon. Ralph M. Freeman

Defendants.

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MEMORANDUM OPINION

On September 19, 1986, following one of the lengthiest trials in this jurisdiction, a jury returned verdicts in this hotly contested case.[1] Only defendant Porter

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[1] The trial commenced January 24, 1986 and concluded September 19, 1986.

was wholly acquitted of the offenses charged. The jury acquitted defendant Schwartz on Count I but convicted him on Count II. Similarly, the jury acquitted defendant Towne on Count I but convicted him on Counts II and III. The jury convicted both defendant Fitzsimmons and defendant Collins on each of the offenses with which the indictment charged them.[2] In an opinion dated

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[2] The indictment charges generally as follows: Count I charges all of the defendants with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962(c). Count II charges all of the defendants with conspiring to violate section 1962(c) of RICO, in violation of 18 U.S.C. Section 1962(d). The remaining six counts charge various defendants with violations of 18 U.S.C. Section 1954.

January 13, 1987, the court granted defendant Towne's motion for arrest of judgment on Count III and granted a similar motion by defendant Fitzsimmons on Counts I and V. All of the defendants appealed their convictions.

On October 30, 1985, prior to the start of the trial, the government filed an in limine motion for a protective order to seal evidence regarding defendant Fitzsimmons and made an in camera offer of proof. The evidence that the government desired sealed consists of transcripts of a tape-recorded conversation between defendant Fitzsimmons and Leonard Schultz, a high-level Federal Bureau of Investigation (FBI) informant for approximately 35 years. The conversation was recorded on May 1, 1985, after Fitzsimmons was indicted but before trial and while he was represented by counsel, Harold Gurewitz. On November 19, 1985, the court ordered that the transcript be sealed and issued a protective order. See Attachment A. The court found that the transcript did not

contain exculpatory information within the meaning of **Brady** v **Maryland**, 373 US 83 (1963). The court also ordered that if the government elected to use the transcript at trial, disclosure to the defense would be required. The government did not use the transcript at trial.

On August 17, 1987, after the defendants filed notices of appeal, the government gave defendant Fitzsimmons a transcript of the recorded statement of defendant Fitzsimmons that had been the subject of the protective order. The government had filed a motion to unseal, and the evidence was unsealed by court order on August 17, 1987. Fitzsimmons' counsel informed other defense counsel about the transcript.

On the basis of the unsealed transcript, the defendants[3] filed motions for new trials under F.R.Crim.P. 33 because of alleged fifth and sixth amendment violations or in the alternative for an evidentiary hearing. This court certified to the United States Court of Appeals for the Sixth Circuit that it would grant the motion for an evidentiary hearing, see **United States** v **Blanton**, 697 F2d 146 (6th Cir 1983) (per curiam), and that court remanded the case for this court to proceed. See Order, **United States** v **Collins**, No. 87-1283 (6th Cir Sept. 22, 1988).

Following remand, the court heard testimony over the course of four days and received into evidence several exhibits, some of which are the subject of another

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[3] Since defendant Porter was acquitted of the charges, he is not part of the present controversy.

protective order.[4] The parties have submitted

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[4] Prior to the start of the evidentiary hearing the government filed a "motion for in camera inspection and examination of certain documents and to seal said documents and brief in support thereof." The government had provided to defense counsel in redacted form certain exhibits for use at the hearing, but it wanted to prevent disclosure of certain documents to defense counsel because of the deliberative process privilege, the investigative techniques privilege, and the government informant privilege. See Motion, at 4. The court granted the motion and ordered those documents sealed. The court, however, has reviewed those documents in ruling on the defendants' motions. After a thorough review of this entire matter, the court finds that its original decision to grant the motion was sound, even though it was a hasty decision done at the insistence

proposed findings of fact and conclusions of law, as well as objections to the other side's proposals, and the matter is ripe for disposition. The court will deny the motions for new trials, and the following represents the court's findings of fact and conclusions of law.

I. BACKGROUND FACTS

A federal grand jury returned the forty-page indictment against the defendants on December 21, 1984. The indictment generally concerns the Michigan Conference of Teamsters Welfare Fund (Fund) and alleges that certain defendants gave or promised to give money or things of

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4 (continued) of counsel. Some of the sealed documents were provided to defense counsel after certain testimony came in concerning them. Therefore, the court will continue its order sealing those documents through the appellate process.

value to other defendants who were associated with the administration of the Fund in connection with the awarding of health care contracts by the Fund to certain companies that promoted and administered health care plans. Count I charges that the defendants violated RICO from April 23, 1979 through December 31, 1982. Count II charges that the defendants conspired to violate RICO from February 1, 1979 through December 21, 1984. The indictment also charges various defendants with violating 18 U.S.C. Section 1954 as follows:[5]

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[5] That statute provides in relevant part:

Whoever being--

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

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(continued)

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to any of his actions, decisions, or other duties relating to any question or matter concerning such plan and any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall (be guilty of violating this statute.] Provided, That this section shall not prohibit the payment to or acceptance by any person or bona fide salary, compensation, or other payments made for goods or facilities actually furnished or

Count	Date	Defendant(s)
3	4-23-79 to 1- 2-80	Towne & Porter
4	4-23-79 to 12-31-82	Collins
5	4-23-79 to 1- 2-80	Fitzsimmons
6	8-79 to 12-31-79	Collins
7	1-31-81 to 2- 7-81	Collins
8	8-23-81 to 8-26-81	Collins

On January 3, 1985, attorney Harold Gurewitz filed his appearance as counsel of record for defendant Fitzsimmons.

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5 (continued)

for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

On January 22, 1985, FBI agents in Detroit, Michigan received information that Leonard Schultz, a long-time FBI informant, had become involved, along with several other people, in narcotics trafficking between Florida and the Detroit area. Schultz operated a labor-management consulting firm, and the FBI had information that he maintained numerous contacts with organized crime figures. FBI Agent John Insogna had been the "control agent" for Schultz since 1979 and had had over 200 contacts with Schultz between 1979 and 1985. As a result of the FBI's knowledge of Schultz's criminal activities, the FBI in early 1985 "closed [Schultz] out as an active informant."[6]

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[6] A confidential informant is one who is not required to give testimony in a judicial proceeding and whose identity is protected.

In late March of 1985, an associate of Schultz was arrested in possession of a half-kilogram of cocaine. Keith Corbett, the attorney with the Detroit Organized Crime Strike Force handling the Schultz prosecution, instructed Agents Insogna and Michael Carone to advise Schultz that the government had a prosecutable case against him and that the government intended to prosecute him unless he could offer substantial cooperation. Corbett's emphasis was upon "hard evidence" with which he could prosecute a major organized crime figure rather than upon intelligence information that Schultz had previously supplied. Corbett also suggested that any conversations Schultz might have relating to such a case should be recorded to obtain the best possible trial evidence.

Accordingly, Agents Insogna and Carone met with Schultz on March 22, 1985 at Buddy's Pizzeria in Farmington Hills, Michigan, and confronted him with the evidence the

government had against him. During the two-hour meeting the agents informed Schultz that the only way he could avoid prosecution or obtain favorable consideration was to provide the kind of cooperation that Strike Force attorney Corbett had outlined. In essence, the more Schultz could help the government with prosecutable cases, the more consideration he would receive with regard to the narcotics charges against him. The agents also informed him that his cooperation would require a more active role, that the FBI could not protect his identity, and that he might be required to testify in a judicial proceeding.[7] Schultz did not agree to

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[7] The testimony established that the FBI indefinitely protects the identity of a cooperating witness or a confidential informant, even if discontinued in that status, unless that person has to testify in

cooperate at the conclusion of the meeting, but after additional meetings with the agents during the following weeks, Schultz agreed to cooperate. Agent Carone then became Schultz's control agent, for Carone was the agent in charge of the Schultz narcotics case. The government gave Schultz until March of 1986 to provide assistance but the government decided in January of that year that Schultz would be unable to assist the FBI in any cases. The information that Schultz did provide to the FBI after March of

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7 (continued) a judicial proceeding. Schultz was ultimately convicted of the narcotics charges. He was indicted on March 27, 1986, though the indictment was sealed. It was unsealed on April 14, 1986, and the case was originally assigned to this court. As part of his defense at trial in February of 1987, Schultz revealed his status as an FBI informant.

1985 was inconsequential in the eyes of the FBI. Also in early 1985, FBI Headquarters in Washington, D.C., had initiated a wide-scale investigation into labor racketeering by organized crime in which several FBI offices in midwestern cities would participate simultaneously. The investigation was called "MIDRAC," an acronym for midwestern racketeering, and was directed primarily at three labor unions, the International Brotherhood of Teamsters (IBT), the Hotel Employees Union, and the Laborers International Union of North America. In addition, MIDRAC was an attempt to "get the movers and shakers of [La Cosa Nostra] leadership." According to the testimony, the MIDRAC investigative concept began in late 1984 and continued in its formative stages in early 1985. See Government Hearing Exhibits 1 & 2. The official kickoff of MIDRAC was in March of 1985 at a meeting in Washington, D.C.

Agent Clark Hall, the supervisor of the MIDRAC investigation at FBI Headquarters, testified that those persons in charge of the project in Washington considered the Detroit part of MIDRAC a major part of the investigation and crucial to the success of the project. Both Agents James Kopf, the agent in charge of MIDRAC in Detroit, and Agent Hall considered defendant Fitzsimmons to be a potential subject of the MIDRAC investigation from the onset, even though he was not a named subject in any relevant FBI documents.[8]

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[8] The testimony was conflicting on whether Fitzsimmons was an unnamed subject, a subject, a potential subject, or not a subject of MIDRAC. The court believes that Fitzsimmons was a potential subject of the MIDRAC investigation. Fitzsimmons was never identified in any FBI documents as being an actual subject of MIDRAC. The so-called

In December of 1984 and January of 1985, a confidential informant relayed information to Agent Joseph Kurgan about Fitzsimmons and possible wrongdoing in connection with a Commuter Limousine service that Fitzsimmons was planning to start. See Government Hearing Exhibit 17, 16, 15, 14. This information indicated that Fitzsimmons was in collusion with an official at Detroit Metropolitan Airport to set up his limousine service much faster and more easily than ordinarily would have been the case. Furthermore, the source told Kurgan that a Teamsters' business agent had a hidden interest in Fitzsimmons' company and that the agent was stirring up labor trouble at the unionized Shortway Charter Lines, the chief

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8 (continued) Commuter Limousine investigation, in which he was a subject, was a local Hobbs Anti-Racketeering Act investigation.

competitor of Fitzsimmons' company. On May 7, 1985, Kurgan received information from the confidential source that Fitzsimmons might have engaged in extortionate activities, which would have violated the Hobbs Anti-Racketeering Act, while he was starting his new commuter limousine service. See Government Hearing Exhibit 10. Kurgan opened a Hobbs Act investigation involving Fitzsimmons and Commuter Limousine Service on June 18, 1985, predicated upon the information received from the source on May 7, 1985. This investigation officially closed on September 16, 1987 for lack of prosecutive merit.

On April 27 or 28, 1985, Schultz contacted Agent Carone, who was located at a satellite FBI office in Troy, Michigan, and told him that Fitzsimmons wanted to meet with Schultz. Although Schultz did not know why Fitzsimmons wanted to meet with him, he suspected that the meeting might relate to Fitzsimmons' Commuter Limousine Service.

Agent Carone knew that Schultz had a reputation for addressing labor problems. Since the Schultz information did not relate to any investigation in Carone's office, Carone contacted Agent Kopf in the Detroit office and provided him with the information. Carone did not know that Fitzsimmons was under indictment until Kopf told him. Agent Kopf was interested in the information in light of the earlier source information concerning Fitzsimmons and Commuter Limousine Service and in light of the MIDRAC investigation. Agent Kopf testified that:

> Prior to this in late '84 and early '85, we had been receiving information concerning Mr. Fitzsimmons' involvement with Commuter Limo. That information indicated that Mr. Fitzsimmons was trying to use his influence as a former Teamster and his possible connection with some of the known organized crime people that we know

to have special favors with Commuter Limo.

As I say, Carone and I discussed what might be discussed and the fact that some of the names that were named subjects in the Mid-Rac case could possibly and would probably come up during this conversation, and we decided to seek authority to have Leonard Schultz wired to talk to Mr. Fitzsimmons.

Hearing Transcript 9-IV. Agent Carone substantiated this testimony:

Agent Kopf advised that there was another labor racketeering investigation that had begun earlier in 1985 which involved various organized crime figures in the area who we believed, from the information we were getting from other sources and from other divisions, FBI offices, may have

been involved in infiltration of the--of Teamsters Unions in this area.

* * *

Mr. Kopf advised that quite possibly a contact between Schultz and Fitzsimmons would be--would lend itself to further these investigations and that he would contact--make the appropriate arrangements to see if we could get authority to consensually monitor this meeting.

Hearing Transcript 22-I.

FBI procedure requires authorization by FBI Headquarters for the consensual tape recording of a conversation by a cooperating witness. The procedure also requires an opinion from a Strike Force attorney that the conversation with a cooperating witness as a participant will not legally entrap an unsuspecting participant in the conversation.

Agent Kopf telephoned Agent Hall at FBI Headquarters in Washington, D.C., informed him of the proposed meeting between Fitzsimmons and Schultz, and requested emergency authorization to record, with Schultz's consent, the conversation at the proposed meeting on May 1, 1985. Hall was the supervisor of the Organized Crime Section at FBI Headquarters. In addition, Hall was the FBI Supervisor of the Fitzsimmons indictment, and he was familiar with the overall investigation. Kopf told Hall that the anticipated subject of the meeting was Fitzsimmons' Commuter Limousine Service and that some of the named subjects of the MIDRAC investigation might be discussed. See also Government Hearing Exhibit 6.

Both Kopf and Hall were aware of the pending indictment against Fitzsimmons in the instant case, and they also knew that he had retained counsel. Hall discussed with Kopf the need to be careful to have the

cooperating witness not discuss the pending charges, for he did not want to compromise the integrity of the instant case. Kopf assured Hall that he was only interested in the possible relevancy of the meeting to the MIDRAC investigation, and Hall was satisfied that the integrity of the pending case would not be endangered. Kopf also told Hall that he had discussed the proposed monitoring with Strike Force attorney Keith Corbett, who had seen no entrapment problems with the proposed tape recording. Satisfied that the monitoring was proper and met with FBI safeguards, see Hearing Transcript 20-II, Hall gave emergency oral authorization for the consensual recording.

In recalling his conversation with Corbett, Kopf testified that he had explained the overall concept of MIDRAC, including some of the named subjects, and that he hoped the conversation between Fitzsimmons and Schultz would further that investigation. See Hearing Exhibit 4. Kopf also testified that

he mentioned to Corbett that the meeting was between Schultz and Fitzsimmons. Corbett, however, testified that he had no recollection of Kopf ever discussing with him the proposed consensual monitoring of the Schultz-Fitzsimmons meeting. In a confirming letter dated May 28, 1985, from the Detroit Office of the FBI to David McKeon, attorney in charge of the Detroit Strike force, the FBI represented that Corbett had been consulted on April 30, 1985 about a proposal to monitor a conversation. That letter, however, referred to the matter as a MIDRAC investigation together with some of its named subjects. Neither Fitzsimmons nor Schultz was named in the letter. See Government Hearing Exhibit 7.

The court believes that Kopf and Corbett discussed monitoring a Schultz conversation relating to MIDRAC but that Kopf either omitted or failed to make clear that the conversation would be between Schultz and Fitzsimmons. Corbett did not know about the

Schultz-Fitzsimmons meeting until Strike Force attorney John Newcomer, the principal trial attorney in the instant case, told him about it in late spring or early summer of 1985. Newcomer was neither informed nor consulted before the meeting "transpired,

On the basis of his conversations with Hall and Corbett, Kopf gave Agent Carone authority to record the proposed conversation between Schultz and Fitzsimmons. Kopf told Carone that Schultz should keep the conversation away from Fitzsimmons' indictment and that he was interested only in information concerning MIDRAC. Carone did not discuss the detaiLs of the pending indictment; nor did he even know the details of the indictment to even discuss it with Schultz.

At approximately 8:30 a.m. on May 1, 1985, Agents Carone and Insogna set up a tape recorder in Schultz's office. Schultz was required to sign an FBI form acknowledging the procedure, agreeing that he was a

voluntary participant, and agreeing to testify if requested. The agents explained to Schultz that he was not to discuss the case pending against Fitzsimmons and that if it came up he should only listen and then attempt to change the subject. In addition, the agents told Schultz not to suggest that Fitzsimmons should plead guilty or do anything else regarding the pending case. This preliminary meeting between the agents and Schultz lasted about 15 minutes, after which the agents left the premises. Fitzsimmons came to Schultz's office at about 9:00 a.m. and they talked for about one hour, which discussion Schultz recorded using the FBI equipment. After Fitzsimmons left, Schultz contacted the agents and they came and retrieved the tapes and the recording equipment. Schultz told the agents that Fitzsimmons had talked about a limousine service and that Fitzsimmons had wanted him to talk to someone. Agent Carone took the tape recording directly to Agent Kopf

without listening to it. Some weeks later Carone learned that Schultz had disregarded their directions and had discussed the pending case against Fitzsimmons.

The transcript of the May 1 conversation was prepared in two parts, totaling 77 pages. The initial part of the conversation relates to Fitzsimmons' Commuter Limousine Service. See generally May of 1985 Transcript, at 1-19. The government does not dispute that Schultz discussed the pending indictment and that Fitzsimmons made some inculpatory and exculpatory statements. The majority of the transcript relates to the Fitzsimmons indictment. For example, Schultz made the following statements:

> Fitzsimmons: "You know that thing I referred to."
>
> Schultz: "Yeah. You mean that one that you're indicted on?"
>
> Fitzsimmons: "No. This, this Commuter Limo." (Tr. p. 5).

* * *

Schultz: "Well, what do they really got you for?" (Tr. p. 23).

"I'm gonna tell ya, you, you're a sunk goose with these guys. You look like the fall guy the way you're talking." (Tr. p. 31).

* * *

"Whatta you do with your wife and kids? I don't know. Do you think if you pled guilty it would help you better?" (Tr. p. 45).

"Boy, you're in a bad spot. I'll tell ya that, Dick. I'd do a lot of thinkin' about this there. What do these guys mean to ya?" (Tr. p. 45).

* * *

"You gotta know somethin' you know." (Tr. p. 48).

* * *

"Maybe they're waitin' for you

to come to them." (Tr. p. 50).

* * *

"You, you just gotta go see somebody confidentially and, why say to 'em, hey, maybe I can't do nothin' here, but I sure can help you elsewhere. You know." (Tr. p. 63). "Well, that's where probably you should, ah, probably talk to somebody. You can't talk to your lawyer. You can't talk to your lawyer."

* * *

"You gotta go down to someone there confidentially sit down and say what can I do for myself (unintelligible) myself and get advice." (Tr. 2, p. 2).

* * *

"Ya know yeah I'll let ya know give ya a call but I gotta tell ya something Dick, you better put your thinking cap on. Save yourself.

I'd I'd hate to see you go from twenty-five seasons. You're you're gonna die there Dick." (Tr. p. 7). (See also, Exhibit 33, p. 2).

On May 3, 1985, a confidential source told Agent Kopf that Fitzsimmons wanted to arrange a meeting with him or someone else at the FBI, without counsel, to discuss cooperating with the government. On May 6, 1985, Kopf and Agent Christine Simpson, who was working on the pending case against Fitzsimmons, went to see Strike Force Attorney Newcomer and informed him of Fitzsimmons' request. Newcomer was concerned about a meeting in which the defendant's counsel would be absent, and he wanted to research the matter and consult with other attorneys before the FBI proceeded any further.

Newcomer consulted with McKeon, Maura Corrigan, then Chief of the Appellate Section of the United States Attorney's Office for this district, and Paul E. Coffey, Deputy

Chief of the Organized Crime and Racketeering Section in Washington, D.C., and concluded that a meeting between Fitzsimmons alone and the government could not take place properly without some sort of prior judicial proceeding in which Fitzsimmons would either waive his right to counsel or have new counsel appointed. On May 9, 1985, Newcomer wrote a letter to the Special Agent in Charge of the Detroit FBI Office outlining these conclusions and emphasizing that no contact should be made with Fitzsimmons without his attorney until these precautions were taken. Fitzsimmons, apparently unwilling to appear before a magistrate, did not meet with the government agents. In addition, Fitzsimmons' terms of cooperation--a dismissal of all charges or a promise of no incarceration--were unacceptable to the government.

After May 9, 1985, but before May 17, 1985, Kopf and Simpson went to Newcomer with the May 1 tape recording and explained the

history surrounding it. Agent Simpson was excited about the value of the tape, expressing her opinion that Fitzsimmons' statements were very inculpatory. She also thought that the tape could have a bearing on the decision to meet with Fitzsimmons about his proposed cooperation.

Newcomer listened to the tape recording but disagreed with Agent Simpson's evaluation of Fitzsimmons' statements. He told Kopf and Simpson to transcribe the tape and also asked if anyone had approved of the recording. The agents indicated that they had obtained authorization. Newcomer assumed that Corbett had approved of the recording and so he asked Corbett, who informed him that he knew nothing about the matter.

In a memorandum dated May 17, 1985, Newcomer explained to Coffey that he had outlined to the FBI the limitations on any direct contact with Fitzsimmons. He also advised Coffey of the May 1 recording and the surrounding circumstances, including

Schultz's efforts to get Fitzsimmons to cooperate. Newcomer opined that the tape recording was of marginal, if any, evidentiary value and that at that time he did not anticipate using it at trial, except as possible impeachment material should Fitzsimmons testify at trial. Newcomer did state, however, that "[i]t is too late to isolate trial counsel from any taint which might accompany the existence of or knowledge of the recorded statements of Fitzsimmons."

Newcomer did nothing more about the tape recording of the May 1 conversation until the FBI provided him with a transcription in September of 1985. He read the transcript and still felt that its evidentiary value was minimal. The following month Strike Force attorney Peter Sprung was assigned to assist Newcomer in the upcoming trial of the defendants. When Sprung arrived in Detroit from Washington, D.C., Newcomer gave him a transcript of the May 1 conversation and asked him to review it. Newcomer asked

Sprung to consider specifically whether the tape had any substantive evidentiary value for use at trial, whether the use of the tape would implicate constitutional or other legal issues, and whether the recording constituted discoverable material, either under F.R.Crim.P. 16 or **Brady**.

Sprung concluded from his review that the tape had no evidentiary value, finding that while Fitzsimmons had made some inculpatory admissions, they were only weakly incriminating and mischaracterized the nature of Fitzsimmons' role. On the issue of the tapes' discoverability, Sprung did not believe that the tapes contained **Brady** material. He felt, however, that the **Brady** issue was a close question. He thought that the tape and transcript should be submitted to the court for its *in camera* review with respect to the discovery issue. Sprung further recommended to Newcomer that they request a protective order from the court on the basis of the need to protect the

integrity of the ongoing, separate investigation in the Commuter Limousine case and to protect the identity of Schultz as a confidential informant.

On October 30, 1985, Newcomer submitted to the court a motion for a protective order, as well as an offer of proof explaining the factual background of-the recorded conversation, which he prepared with Agents Simpson and Kopf. See Attachment B. The court granted the motion and issued a protective order on November 19, 1985. See Attachment A.

Both Newcomer and Sprung testified that, once the protective order issued, they stored the only copies of the transcripts they had in locked filing cabinets and did not remove them during the entire course of the trial. They also testified that they had made no use of the contents of the transcript in preparation for trial or during the trial itself.

Following Schultz's narcotics trial in which he revealed his FBI informant status and following the trial of this case, Sprung periodically reminded Newcomer about the sealed evidence. Newcomer in turn would question Agent Kopf about the status of the Commuter Limousine case. Kopf told Newcomer on July 27, 1987 that the investigation was closed, following which the government filed its motion to unseal the tape on August 12, 1987.

II. SPECIFIC FINDINGS AND CONCLUSIONS

A. Sixth Amendment

From these facts, some of which the court will expand upon further, the court concludes that the government violated the sixth amendment[9] but that a new trial is not

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[9] The Sixth Amendment states in relevant part that the accused shall "have the assistance of counsel for his defence."

warranted because of the lack of prejudice to the defendants.

The evidentiary hearing in part concerned the "separate offense" exception of **Massiah** v **United States**, 377 U.S. 201 (1964). In **Massiah**, the defendant had been indicted and was represented by counsel when a codefendant decided to cooperate with the government in its continuing investigation of the defendant's alleged narcotics activities. A radio transmitter was installed under the front seat of the codefendant's car so that a government agent could overhear conversations between the codefendants. One evening the codefendants engaged in a conversation in the car during which the defendant Massiah made several incriminating statements that the agent testified about during Massiah's jury trial. The Supreme Court held

> that the petitioner was denied the basic protections of [the sixth amendment] when there was used against him at his trial evidence

> of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.
>
> * * *
>
> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances . . . could not be used . . . against him at his trial.

Id. at 206-07 (emphasis added and in original).

In **Weatherford** v **Bursey**, 429 U.S. 545 (1977), an undercover government agent was arrested along with the defendant Bursey. To protect his identity, the agent continued the facade of being an arrested defendant and retained counsel. He also met with defendant Bursey and Bursey's counsel and the impending trial was discussed. The agent did not inform the prosecutor or the prosecutor's office of any details regarding the criminal action. The Supreme Court held in the subsequent civil rights case that the agent did not violate Bursey's sixth amendment right to counsel, stating: "[Wlhen conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." Id. at 552. Because the agent did not communicate anything to the prosecutors, there was no sixth amendment violation. The court noted, however that

> [h]ad Weatherford testified at Bursey's trial as to the conversations between Bursey and [his counsel]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554.

In **United States** v **Henry**, 447 U.S. 264 (1980), the Court considered whether the sixth amendment was violated when incriminating statements made by an indicted and represented defendant to his cellmate, an undisclosed by an indicted and represented defendant to his cellmate, an undisclosed

government agent were admitted at his trial. The **Henry** Court applied the "deliberately elicit" test of **Massiah** and concluded that the government informant had "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." Id. at 270. This sixth amendment violation occurred even though the informant had not questioned the defendant. Moreover, the government agent had instructed the informer to be alert to the defendant's statements but not to initiate any conversations or question him about the bank robbery. The informant had, however, "stimulated" conversations with the defendant, and the informant's actions amounted to "indirect and surreptitious interrogatio[n]" of him: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance counsel, the Government violated Henry's Sixth Amendment right to counsel." Id. at

273-74.

In **United States** v **Morrison**, 449 U. S. 361 (1981), federal agents, aware that the defendant had been indicted and had retained counsel, met with the defendant without counsel present and sought her cooperation in a related investigation. The agents disparaged defendant's counsel and attempted to persuade her to cooperate. The agents met with the defendant a second time, again without counsel present, but the defendant did not agree to cooperate and she did not make any incriminating statements. The appellate court held that the sixth amendment right to counsel had been violated and dismissed the indictment. The Supreme Court assumed that the sixth amendment was violated and held that the dismissal of the indictment was inappropriate absent a showing of prejudice to her representation or to the fairness of the criminal proceedings. Id. at 365. "Here, respondent has demonstrated no prejudice of any kind, either transitory or

permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted." Id. at 366.

In **Maine** v **Moulton**, 474 U.S. 159 (1985), the indicted defendant, represented by counsel, agreed to meet with a codefendant and his lawyer to plan defense strategy for the upcoming trial. The codefendant had agreed to cooperate with the government and to wear a body transmitter. The codefendant recorded the defense meeting at which he caused Moulton to make incriminating statements. Those statements were admitted at the defendant's trial. The Supreme Court held that the admission at trial of the incriminating statements violated the defendant's sixth amendment right to counsel. Because the very purpose of the meeting was to discuss defense strategy, the police knew

that Moulton would make statements that he had a Constitutional right not to make without the assistance of counsel. Id. at 177. The Court found it irrelevant that the police had a legitimate interest in investigating another crime--Moulton's intention to kill a witness:

> The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial

of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in **Massiah**. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would

> unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Id. at 179-80 (footnotes omitted).

More recently, in **Kuhlmann** v **Wilson**, 477 U.S. 436 (1986), the defendant was arraigned on robbery and murder charges and placed in a cell with a prisoner who was a police informant. The prisoner had agreed to listen to the defendant's conversations and report them to a detective. The detective

had instructed the prisoner not to question the defendant but to "keep his ears open" for other perpetrators. In the cell the defendant told the same story that he had given to the police upon his arrest, prompting the informant to respond with disbelief (the story "didn't sound too good"). The defendant changed his story over the next few days and eventually admitted to the crimes. The prisoner, who had taken notes of the statements, informed the detective of what he had heard, and the statements were introduced at trial. The Supreme Court held that there was no sixth amendment violation because the informant did not stimulate conversations about the crimes charged.[10] The detective had instructed the

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[10] This holding was an alternate holding and rested largely on according the state trial court's factual findings the presumption of correctness as required in a habeas corpus case.

prisoner only to listen to the defendant and the prisoner had in essence followed those instructions. Thus, the admission at trial of the defendant's incriminating statements did not violate the sixth amendment. Id. at 459-60; see also **Beatty** v **United States**, 389 U.S. 45 (1967) (per curiam).

Applying the above authorities to the facts of this case, the court finds that defendant Fitzsimmons' sixth amendment right to counsel was violated when Schultz engaged him in extensive conversation about the pending indictment in the absence of his counsel, which included disparaging his counsel and suggesting that Fitzsimmons cooperate with the government. While the court finds that the FBI had a legitimate interest in recording the conversation as possibly relating to the MIDRAC investigation, that interest does not shroud Schultz with the authority to interrogate Fitzsimmons about the charges on which the grand jury had indicted him. Without

uestion, Schultz had an interest in trying o elicit information from Fitzsimmons about he pending indictment and to have him ooperate with the government. As Agents arone and Insogna emphasized, he was facing erious drug charges and it was in his nterest to help the government. Given both itzsimmons' and Schultz's situation, it is ot surprising that the pending indictment as discussed. Moreover, the government's nstructions for Schultz not to discuss the ndictment do not remedy Schultz's express iolation of those instructions. Without a oubt, Schultz "took some action, beyond mere istening, that was designed deliberately to licit incriminating remarks." Kuhlmann, 477 .S. at 459. The inquiry does not end, owever, for the defendants must show rejudice to warrant a new trial.

Both **Morrison** and **United States** v **teele**, 727 F2d 580 (6th Cir), cert. denied, 67 U.S. 1209 (1984), require a showing of rejudice to obtain relief for a sixth

amendment violation. In **Steele**, the United States Court of Appeals for the Sixth Circuit mentioned three factors relevant to the prejudice inquiry:

* * *

> (2) whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant's intrusion;
>
> (3) whether any information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and
>
> (4) whether the details about trial preparations were learned by the government.

Id. at 585. Applying these factors, the court does not find any prejudice resulting from the May 1 transcript to which the government prosecutors were privy. First, the government admits that Fitzsimmons made

some important admissions: that Towne hired Mrs. Fitzsimmons and paid her $11,000; that Towne wanted Fitzsimmons to work for him after Fitzsimmons' release from prison; that Porter paid Fitzsimmons $400 a month; that Towne paid for Fitzsimmons' hotel rooms in Miami, Washington, and California; and that Fitzsimmons "brought [Brown and Towne] in on the . . . dental program." Those statements were not introduced at trial, however Fitzsimmons did not testify at trial and so the statements were also not used as impeachment material.

Second, the court finds that the transcript did not provide the government with any substantive information that it did not already have. The court agrees with the government's contentions that the conversation tracks the charges against Fitzsimmons as alleged in the indictment. Further, Fitzsimmons' attorney was not present at the Schultz-Fitzsimmons meeting, and Fitzsimmons did not reveal any

attorney-client communications. In large part, Fitzsimmons generally denied the charges against him. To the extent that he discussed specific facts, the court finds that the government was aware of them--specifically, that Fitzsimmons resigned from the Fund on January 2, 1980; that he never got a job from Towne after he returned from prison; that the payments from Porter were backed by "IOU's" and thus assumed the form of loans; and that Brown only paid his hotel bills and not his airfare in connection with the trips to Miami, Washington, D.C., and Los Angeles. The court can find no particular defense strategy that the transcript revealed to the government. See United States v Kilrain, 566 F.2d 979, 982 (5th Cir. 1978). Fitzsimmons has not shown that the transcript provided the government with any evidence used at trial, either directly or indirectly. See Steele, 727 F.2d at 586.

Finally, Fitzsimmons did not offer any testimony suggesting that either his attorney-client relationship or his defense at trial was adversely affected by his conversation with Schultz that the government recorded. There is no prejudice resulting from the sixth amendment violation for which a remedy should be granted;[11]

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[11] The court also does not find that Schultz or the government invaded the defense camps of defendants Collins, Schwartz, or Towne. Nothing in the transcript relates to the trial strategy of or the charges against those defendants. Those defendants may not vicariously assert Fitzsimmons' sixth amendment right. See **United States** v **Payner**, 447 U.S. 727 (1980); **United States** v **Fortna**, 796 F.2d 724, 733-34 (5th Cir. 1986); **United States** v **Valencia**, 541 F.2d 618, 621-22 (6th Cir. 1976). While Fitzsimmons did discuss his involvement with

B. Fifth Amendment, Rule 16, and **Brady**

The defendants also contend that the government acted improperly in failing to disclose the Schultz-Fitzsimmons meeting and in misleading the court in its offer of proof. See Attachment B.

When the government attorneys received the transcript they acted within the bounds of the law by submitting it to the court for judicial review and by seeking a protective order under F.R.Crim.P. 16(d)(1). While the court does find that the offer of proof was

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11 Towne, the statements basically track the allegations in the indictment. Fitzsimmons made only two references to Collins, but there has been no showing how either reference furthered the government's case. Similarly, Fitzsimmons referred to Schwartz only twice but neither reference has been shown to have furthered the government's case.

misleading in certain respects, as was some of the testimony and exhibits at the hearing, this finding does not amount to a

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11 In addition, both of the prosecuting attorneys testified that they regarded the evidentiary value of the taped conversations as marginal; that they did not review the transcript during trial preparation or during the course of the trial; and that to the best of their knowledge, they did not use any information from the transcript to prepare the government's case.

Nor does the court find any need to grant a new trial because government agents may have instructed or allowed confidential informants to contact Fitzsimmons in regard to cooperating with the government. Fitzsimmons never cooperated. He has not demonstrated any prejudice in this regard, and there is evidence that Fitzsimmons himself suggested possible cooperation.

denial of the defendants' right to a fair trial or a **Brady** violation. Again, the court does not find a sufficient amount of prejudice to the defendants to warrant a new trial.

As mentioned, the court has found that the reasons for recording the Schultz-Fitzsimmons conversation were legitimate, for it was potentially related to the MIDRAC investigation of which Fitzsimmons was a potential subject. The conversation may have implicated high-level organized crime figures who were subjects of MIDRAC. The exhibits and testimony bear this finding out. The subsequent events, however, trouble the court.

Specifically, the court cannot square the government's argument in its October 1985 offer of proof that Fitzsimmons was "part of and one of the subjects of [MIDRAC] "with its subsequent categorization of Fitzsimmons and the May 1 transcript as relating to the Commuter Limousine investigation. The

Commuter Limousine investigation by Agent Kurgan was not a nationwide investigation and it was not related to MIDRAC; it was strictly a local Hobbs Anti-Racketeering Act investigation. Moreover, Agent Kurgan did not receive the Schultz-Fitzsimmons transcript for possible use in his investigation until 1986, well after the government's offer of proof in which it apparently asserts Kurgan's investigation as the one in need of Protection from disclosure. Kurgan opened his investigation on June 19, 1985 on the basis of the May 7, 1985 source information.[12] Therefore, to assert in October of 1985 that the

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12 The court also does not think that this Hobbs Act investigation was a so-called "Son of MIDRAC," for Kurgan's investigation opened up from his May 7, 1985 source information and it was never cross-referenced to MIDRAC.

Schultz-Fitzsimmons conversation is related to the nationwide MIDRAC investigation and to assert later that it is related to the local Hobbs Act investigation is disingenuous. The Kopf Affidavit of February 8, 1988 is also somewhat misleading, for it implies that a reason for recording the May 1 conversation was source information about Fitzsimmons using his influence to secure contracts for his limousine service. That source information, however, was not received until May 7, 1985 by Agent Kurgan. See Government Hearing Exhibit 10.

Nevertheless, the court is convinced that the transcript was properly sealed to protect Schultz's identity. While he was not a high-level FBI informant at the time of the offer of proof, FBI policy is to protect his identity until his testimony is needed at trial.

Furthermore, the defendants have suffered no prejudice from the lack of disclosure. This court reviewed the

transcript before trial and held that it did not contain exculpatory evidence under **Brady**. That ruling has not been challenged by Fitzsimmons or Collins.[13]

Defendant Schwartz focuses on an exchange in which Schultz states that Fitzsimmons is "in a bad spot" and asks him what "these guys" mean to him. Fitzsimmons replies that he does not know what their "deal" is and that he knows nothing about Sol Schwartz. Schwartz argues that, if he had known of this evidence, he would have used it "to contradict and undermine the government's conspiratorial theory." The court does not agree.

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[13] To avoid further inundating the court with pleadings, defendant Collins adopted the submissions of the codefendants. Collins did file a brief in support of his motion for a new trial prior to the evidentiary hearing, however.

The government did not take the position at trial that Fitzsimmons knew what Schwartz and Dorfman were getting in return for helping Brown; the government's proofs showed that Schwartz and Dorfman prided themselves on the fact that their coconspirators in the Fund were ignorant of their "deal." In addition, the evidence showed that the two men routinely attended Trustee meetings together (see GX 37; 22 Trial Tr. 104); that Fitzsimmons frequently called the office of Schwartz and Dorfman (GX 356); and that, while Fitzsimmons was in prison, he expected Schwartz and Dorfman to "cover all of his . . . bills." (See GX 2SB, at 11). The intercepted conversations between Schwartz and Dorfman indicate that Schwartz was familiar with Fitzsimmons' participation in the charged conspiracy. (See GX 24B, at 9; GX 2SB, at 3, 11, 15; GX 27B, at 3-4, GX 33B, at 1-2). Finally, a general rule of conspiracy law is that "[i]t is not necessary . . . for all coconspirators to

know each other or to have worked together on all phases of the criminal enterprise." **United States** v **Winship**, 724 F.2d 1116, 1122 (5th Cir. 1984).

Similarly, defendant Towne's contention that he could have used the transcript at trial does not warrant a new trial. To be entitled to a new trial on **Brady** grounds, there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **United States** v **Bagley**, 473 US 667, 682 (1985).[14] On the whole, the court finds that

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[14] To support a motion for a new trial on the basis of newly discovered evidence, the defendant must show that "the evidence (1) was discovered only after trial, (2) could not have been discovered earlier with due diligence, (3) is material and not merely cumulative or impeaching, and

while the transcript may have been useful to the defendants, it would not have changed the outcome of the trial.

III. CONCLUSION

For the above reasons, the defendants' motions for new trials are DENIED. The government shall submit an appropriate order.

RALPH M. FREEMAN
United States District Judge

Dated: September 29, 1989.

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14 (continued)

(4) would likely produce an acquittal if the case were retried." **United States** v **Barlow**, 693 F2d 954, 966 (6th Cir 1982). The defendants have not met the **Bagley** or **Barlow** standard.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph
Defendant.	M. Freeman

PROTECTIVE ORDER

The government having filed, pursuant to Rule 16(d)(1), Federal Rules of Criminal Procedure, a Motion in Limine for Protective Order Regarding Defendant Fitzsimmons, and also having filed, in camera and ex parte, an Offer of Proof Regarding Evidence as to Which the Government Seeks a Protective Order together with Attachment 1, and the Court, having reviewed all of the material submitted, including the Defendant

Fitzsimmons' Response in Opposition to such Motion, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

That, although Attachment 1 would ordinarily be subject to discovery and inspection by the Defendant Fitzsimmons in accordance with Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, because of the special circumstances in this case, as outlined in the Government's Offer of Proof Regarding Evidence as to Which the Government Seeks a Protective Order, discovery of Attachment 1 would not be necessary and appropriate, and would be deferred until such time when, because the special circumstances may have changed, it would no longer be necessary to restrict discovery of this material;

That Attachment 1 does not contain exculpatory information within the meaning of **Brady** v **Maryland**, 373 US 83 (1963).

That should the government elect to offer this material into evidence during the trial, or should they elect to use the material during the presentation of any evidence by the defendants, then discovery and inspection of this material would no longer be deferred and the government would be compelled to disclose Attachment 1, pursuant to the **Jencks** Act, Title 18, United States Code, Section 3500.

Honorable Ralph M. Freeman
United States District Judge

Dated: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph
Defendant.	M. Freeman

_____/

ORDER GRANTING GOVERNMENT'S MOTION TO SEAL OFFER OF PROOF

The government having filed a motion to seal and the court being fully advised on the premises;

IT IS HEREBY ORDERED that the Offer of Proof and Attachment 1 be and is hereby sealed.

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HONORABLE RALPH M. FREEMAN

UNITED STATES DISTRICT COURT JUDGE

Dated: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph M. Freeman
Defendant.	

OFFER OF PROOF REGARDING EVIDENCE AS TO WHICH THE GOVERNMENT SEEKS A PROTECTIVE ORDER

NOW COMES the United States of America, by and through its attorneys Joel M. Shere, United States Attorney, and John L. Newcomer, Special Attorney, United States Department of Justice, and as an offer of proof of evidence as to which it seeks to

restrict discovery of evidence regarding the Defendant Fitzsimmons, states as follows:

1. That commencing in January, 1985 and continuing to the present, Special Agents of the FBI are conducting a nationwide investigation into organized crime influenced labor racketeering offenses. Defendant Richard Fitzsimmons, through his past and current associations with the International Brotherhood of Teamsters, and his association with Airport Limousine Services, Inc., is part of and one of the subjects of the national investigation. This investigation is separate and completely unrelated to the charges contained in the indictment which are the subject matter of this cause.

2. That during the course of that investigation, on or about April 30, 1985, an FBI top echelon criminal informant, whose identity at this time must remain protected, reported to the FBI that the Defendant Fitzsimmons had recently contacted him on several occasions and requested his

assistance in helping him with a "problem" with regard to Airport Limousine Services, Inc. and other union matters. That meeting was scheduled to take place on May 1, 1985 at the office of the criminal informant.

3. That the criminal informant and the FBI agents believed, in good faith, that Fitzsimmons would possibly request the assistance of the informant and that that assistance would involve criminal activities, and that the requested meeting would involve discussions of a conspiratorial nature. It was the understanding of the agents that the meeting and anticipated conversation would relate only to the investigation then currently pending and would be unrelated and irrelevant to the charges then pending against Defendant Fitzsimmons in this cause.

4. That on May 1, 1985, the FBI, through their internal administration, authorized and assisted the criminal informant and Fitzsimmons would be recorded

and preserved as evidence of potential crimes.

5. That at approximately 9:00 a.m. on May 1, 1985, the criminal informant and Fitzsimmons and a meeting in the office of the informant for approximately one hour, and the conversations of both the criminal informant and the Defendant Fitzsimmons were recorded. The anticipated conversations which related to the purposes for which Fitzsimmons had requested the meeting were recorded and do not relate in any way to the indictment in this cause. However during the course of the recorded meeting between the criminal informant and Fitzsimmons, the discussion turned to Fitzsimmons' involvement and some of the facts and circumstances surrounding the indictment in this cause. During this part of the discussion, recorded and now recently transcribed, the Defendant fitzsimmons made statements to the criminal informant which are both self-serving and inculpatory with regard to his conduct

relevant to the charges set forth in the indictment in this case. We are enclosing, under seal, a copy of a transcript of that recorded conversation for the Court's in camera review. This transcript is in two parts, one 65 pages, and the other 13 pages). (See Attachment 1).

6. That the government is presently engaged in preparation for trial and has not yet decided whether or not it will offer the recorded evidence at the trial either as part of its case in chief or as rebuttal during any potential cross-examination of the Defendant Fitzsimmons during the presentation of any defense, or either one. In the event that the government offered the evidence as part of its case in chief then the statements would become relevant and disclosure would be called for pursuant to the Jencks Act.

7. That the government believes that this information is not discoverable pursuant to Rule 16, Federal Rules of

Criminal Procedure or the Jencks Act (18 U.S.C. Section 3500) at this time. It is our view that the evidence is certainly not exculpatory and is not discoverable as **Brady** evidence.

8. That it is the government's position that, although the evidence could become relevant if we decided to use the evidence during the trial, at which time disclosure would be made in accordance with the **Jencks** Act, it is not discoverable at this time. Disclosure at this time would severely curtail the ongoing investigation of Fitzsimmons and others. The effectiveness of the criminal informant for any further use he might provide to either the continuing investigation into Mr. Fitzsimmons' suspected criminal activities or other matters, would be lost, and any disclosure would place the life and the personal welfare of the criminal informant in serious jeopardy.

9. That assuming, arguendo, that the Court were to rule that this evidence is

discoverable to the Defendant pursuant to any of the above reasons already described, the government would seek a Protective Order at this time that would delay furnishing this information to the Defendant until such time when it is offered at trial.

WHEREFORE, the government moves that the Court find that this evidence is not discoverable pursuant to Rule 16, Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. Section 3500) or pursuant to **Brady** v **Maryland**, 373 U. S. 83 (1963). In the alternative, if the Court rules that it is discoverable, we request the Court to issue a Protective Order pursuant to Rule 16(d)(1), allowing the government to delay furnishing this information until such time when and if it is offered.

Respectfully submitted,

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Dated: October 30, 1985.